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No. 75-1423

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENTUCKY UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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1. On May 1, 1973, petitioner filed with the Federal Power Commission a proposed rate increase for the sale of electric power to eleven of its all-requirements customers in Kentucky ("Cities") based on contracts with those customers executed between 1963 and 1972. Cities petitioned to intervene in the proceeding and moved to reject the filing. The Commission rejected the proposed rates on the ground that the underlying contracts were fixed rate contracts without any provision for unilateral rate increases (Pet. App. 22a-26a). Petitioner filed an application for rehearing, asserting that Kentucky law allowed unilateral rate increases in every instance and that the contracts should be viewed in light of that law to determine the contractual intent of the parties. The Commission denied rehearing, noting that the

contracts were entered into after petitioner had begun filing its schedules with the Commission and that Kentucky law was therefore irrelevant (Pet. App. 27a-32a).

On petition for review, the court of appeals affirmed the Commission's order (Pet. App. 1a-19a). It found that all the contracts were executed after the Commission had assumed jurisdiction and that "[i]n each instance the agreement unambiguously designates a fixed rate" (Pet. App. 14a). The court also concluded that the Commission properly rejected the filing without an evidentiary hearing, because the issue presented was a purely legal question and the Commission is authorized "to turn down a filing that is 'patently a nullity as a matter of substantive law'" (Pet. App. 18a-19a).

2. Petitioner argues that, since the contracts in question were similar to earlier contracts made at a time when petitioner was subject to state regulation, the court of appeals erred in concluding that "state law had no proper role in the process of interpreting the contracts" (Pet. App. 14a). As the court correctly stated, however (Pet. App. 14a-15a; footnotes omitted):

> Each agreement in force when [petitioner] filed for the rate increases in issue was executed after the Commission assumed jurisdiction over the sales in question, or after it became evident that the Commission was endeavoring to do so. In each instance the agreement unambiguously designates a fixed rate. There is no reservation of a right to alter the contract unilaterally, nor any reference to rate changes or to procedures for such changes. By the same token, there is no basis upon which Kentucky law might be applied to contradict the unmistakable terms of the contracts in regard to rates.

Petitioner claims that this reasoning "completely undercuts the foundation principles of the *Mobile-Sierra-Memphis* doctrine" (Pet. 16, 22).[1] To the contrary, however, the court's decision is wholly faithful to the principles of those decisions. The rule is that "[t]he contract between the parties governs the legality of the filing." *Richmond Power & Light* v. *Federal Power Commission*, 481 F. 2d 490, 493 (C.A. D.C.), certiorari denied *sub nom. Indiana & Michigan Electric Co.* v. *Anderson Power & Light*, 414 U.S. 1068. The parties' freedom to control the legality of the rate filings is in no way compromised by the decision of the court of appeals. The parties remain "free to forge a going-rate agreement by a reference to state-law principles which impart that effect" (Pet. App. 9a-10a).

The contracts here, however, unambiguously provide for fixed rates (Pet. App. 14a). As Judge Lumbard stated in his concurring opinion, "[t]he court correctly decline[d] * * * to step outside the corners of an unambiguous contract" (Pet. App. 20a; and see *id.* at 21a, n. 5). Of course, the intent of the contracting parties should control, and "where the decision involves the interpretation of the parties' intent as revealed in the language of the contract, it is proper to defer to the Commission's expertise if its decision is 'amply supported both factually and legally.'" *Gulf States Utilities Company* v. *Federal Power Commission*, 518 F. 2d 450, 457 (C.A. D.C.).

3. Petitioner contends that it should have been afforded an evidentiary hearing "in order to establish the intent of the parties in light of the long history of commercial

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[1]The reference is to this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348; *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

relationships between them under the exclusive regulatory authority of the Kentucky Commission" (Pet. 24). The court of appeals found that argument unpersuasive (Pet. App. 18a-19a; footnotes omitted):

> The obvious answer is that [petitioner] presented no material factual issue for investigation at such a hearing. Construction of unambiguous features of a written contract is a legal problem; "the legal effect of reasonably clear terms of a contract," we have said, "is a question of law...." We have also compared a motion to reject a rate-increase filing with "a motion to dismiss on the face of the pleading" and we have recognized the Commission's authority to turn down a filing that is "patently a nullity as a matter of substantive law."

Petitioner fails to overcome the impediment that its unambiguous contracts provide for fixed rates. It merely asserts that "Kentucky law should be carried over to [the parties'] continuing relations before the FPC" (Pet. 22). But the contracts make no explicit reference to Kentucky law, and there is no reason to suppose that such an unstated reference was intended. The parties adopted the relevant contractual language after it had become clear that their contractual relationship would be subject to Federal Power Commission jurisdiction. See, *e.g., Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205. In these circumstances, the Commission properly rejected petitioner's contentions without a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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